

# **Zimbabwe Mission Report to the Ministry of Commerce, Trade, and Industry**

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## **REPORT ON THE ZIMBABWE STUDY MISSION ON UNFAIR TRADE PRACTICES**

### **I INTRODUCTION AND BACKGROUND**

- 1.1 Zambia has been facing huge difficulties with the recent influx of imports, particularly those from Zimbabwe, and continued restriction to the Zimbabwean market despite the fact that both countries are key members of the COMESA FTA. A number of Zambian industries are facing closure and many of them have cited the unfair competition posed by Zimbabwean imports coming into Zambia at below market price as the major cause of their demise. This situation has been exacerbated by the parallel exchange rate regime currently in place in Zimbabwe and the ability of small cross border traders to take advantage of this by exchanging foreign currency at the black market rate further reducing the effective price of the products.
- 1.2 The Zambia Association of Manufacturers (ZAM) has raised this issue with the Zambian Government expressing strong concern at the impact it was having on Zambian industrial production. The Zambian Government has indicated that this issue is of great importance to them as well, and have began the process of developing mechanisms to address the problem. However, due to a lack of resources and inadequate capacity both at the Ministry of Commerce, Trade and Industry (MCTI) and ZAM, they have been unable to conduct a detailed fact-finding mission or analysis of the situation on the ground.
- 1.3 In this regard, ZAM approached the Zambia Trade and Investment Enhancement Project (ZAMTIE) to assist in conducting a study to assess the pricing structure for a number of products in Zimbabwe and subsequently develop a mechanism to level the playing field and allow Zambian producers to compete fairly with Zimbabwean products. The study would explore the many aspects of the cross border trade regime between Zambia and Zimbabwe. It examined the current pricing structure of key products as identified by ZAM and determined what the actual price should be if the products are purchased at the official price and exchange rate. Further it explored the mechanism that could be implemented within the context of current regulations and laws to enforce fair trade.

#### **Aim of the Mission**

- 1.4 The aim of the study and mission was to do the following:
  - a. Conduct a price survey of selected products from Zimbabwe. This survey covered the factory, wholesale and retail price of the following selected products:
    - i. Cement
    - ii. Long Life milk
    - iii. Beverages i.e. toy drinks
    - iv. Roofing Materials

- v. Blankets
    - b. Collect trade and other production and consumption statistics of the selected products under study.
    - c. Document all procedures and Zimbabwe government regulations that may impact on trade, particularly, the foreign exchange regulations currently in place and other NTB's if any on Zambian potential exports to Zimbabwe.
    - d. Assess customs operations and formalities at the Chirundu border post by documenting the process involved in importing products from Zimbabwe.
    - e. Based on the above develop a mechanism that would promote increased fair trade between the two countries and level the playing field for Zambian industry.
- 1.5 In this regard, a team of experts visited Zimbabwe between the 2<sup>nd</sup> of June 2002 and 9<sup>th</sup> of June 2002 to study the Zimbabwean economic condition with specific reference to trade between Zambia and Zimbabwe. The team included the following officials: Mr. Trevor Simumba – ZAMTIE, Private Sector Development Specialist, Mr. Trevor Sichombo – MCTI, Economist and Mukela Mutukwa – ZRA Senior Collector. Meetings were held with key Government and private sector institutions. A summary of the discussions held is given below.

## **II SUMMARY OF MEETINGS HELD**

### **A. MINISTRY OF INDUSTRY AND INTERNATIONAL TRADE**

#### **Opening Remarks**

- 2.1 The Chairperson welcomed the Zambian delegation and mentioned that the issue of pricing had become a major problem in the trade between Zambia and Zimbabwe. It was further said that Zimbabwe would never want to harm the Zambian industry and hoped that the “grey areas” in trade would be solved amicably. It was also indicated that formal trade had declined and informal trade had dramatically increased. Against this background, the Zambian delegation was wished good luck in their fact-finding mission and assured of the Zimbabwean government’s cooperation during the mission.
- 2.2 The Zambian delegation explained that the study was prompted by the problems cheap imports from Zimbabwe were creating for local industry. The cause of such low prices being the parallel market exchange rate problem in Zimbabwe. The study would be restricted to five products and the focus would be to get the prevailing prices (in the absence of the parallel exchange rate), the distribution channels of products entering Zambia and the exchange rate system over time. The study would also provide an input to the Joint Permanent Commission and the Trade Facilitation Subcommittee as discussed by the two respective Heads of State recently.

#### **Discussion**

- 2.3 It was reported that there are no products that are officially banned from being exported to Zambia, however as a Government there was a temporal suspension on the exportation of certain products because of shortages in the country. These include agriculture products, sugar and cooking oil. Agriculture products even in times of abundance have to be exported by way of permits from the Ministry of Agriculture.
- 2.4 The existence of the parallel exchange rate was identified as the source of all trade problems experienced. It makes it possible for informal traders to sell at very low prices and make huge profits e.g. US \$ 109 could purchase 1 metric ton of cement officially where as the same amount on the unofficial market could purchase 5 metric tones of cement. This was described as a complex situation for Zimbabwe.
- 2.5 Zambia Revenue Authority has tried to counteract the informal trading by demanding CD1 forms from banks, however these forms were readily available to traders even when they change their money on the black market. It was reported that the small-scale traders were happy with the current situation as they were making huge profits by trading on the black market and not the official institutions.

## **B CIRCLE CEMENT**

### **Discussion**

- 2.6 The company reported that it had no motivation to export to Zambia because there is a sister company, Chilanga Cement. In the period between 2001 and now the company made official exports to Zambia of only 20 metric tones of cement. The company has two prices for its product, the Government controlled price for the domestic market and the export price, e.g. Local price - Zim \$ 10 250 per metric ton and for exports - US \$ 65 per metric ton.
- 2.7 The company mainly produces for the domestic market and had been labelling their bags "NOT FOR EXPORT" to reduce on the unofficial exports. The company is losing out on foreign exchange to middlemen who are taking advantage of the parallel exchange rate and the controlled price.
- 2.8 The company agreed that cement from Zimbabwe does not meet the Zambian standards however this cement meets the international standard, EN 32 (European Standard) and the Zambia Bureau Of Standards is still allowing this cement in the country on this account.
- 2.9 The company reported that they had about 150 customers and it was difficult for them to know exactly who the middlemen exporters were. The company was negatively affected by the parallel exchange rate and production was at less than 30% because they cannot find foreign exchange to purchase spare parts for their machinery.

## **C. DAIRIBORD ZIMBABWE LIMITED**

### **Discussion**

- 2.10 Dairibord has about seven factories in Zimbabwe and produces more than a hundred products. The Company recently acquired Lyons – Zimbabwe and was trying to acquire Lyons – Zambia as well.
- 2.11 The Company stopped exporting officially to Zambia in 2000 because there was no protocol for milk and milk products between the two countries. Zambian inspectors had gone there and inspected these products and the plants but before resuming exports there was an outbreak of foot and mouth disease in Zimbabwe. Dairibord had established distributors in Zambia; these are Wanangwa Wholesalers, Suhails Distributors and Seebro International Trading.

- 2.12 The Company used to capture about 2% of the Zambian dairy products market. Despite not officially exporting, Dairibord products still flood the Zambian market and were selling at very low prices and directly competing with Dairibord's official exports. To illustrate the impact of the parallel market Dairibord cited the example of Steri Milk exports to Malawi, which was landing unofficially at US\$1.50 per case while the official landed price was US\$6 per case.

#### **D. RESERVE BANK OF ZIMBABWE / MINISTRY OF FINANCE**

##### **Discussion**

- 2.13 RBZ acknowledged existence of the dual exchange rate (unofficial) and mentioned that this had affected the Zimbabwean industry efficiency. Both Zimbabwean and Zambian traders facilitate the problem and therefore low prices are a direct result of the duo exchange rate.
- 2.14 The Zambian traders change their foreign currency on the black market and purchase goods in local currency from Zimbabweans who pay the goods at controlled prices. ZIMRA were instructed that non-residents could not complete a CDI form and that the value of goods should be to the amount appearing on the bank exchange receipt. Also that any purchase of goods amounting to Z\$5,000 and up requires a CDI form. ZIMRA is empowered not to allow goods to cross unless they have satisfactory documentation.
- 2.15 These stringent measures have proven not to be effective in the presence of the black market rate and that the CDI forms are readily available to traders. ZRA has no right to refuse entry of any products if they produce satisfactory documentation at the border of which many traders do.
- 2.16 To address the issue of CDI forms RBZ was in the process of printing securitised CDI forms and these would be accountable to various issuing banks. As of 1<sup>st</sup> June new conditions/regulations for Bureaux de change such as a higher capital requirement and use of special equipment used came into effect. This would help the Central Bank monitor their activities.

#### **E ZIMTRADE**

##### **Discussion**

- 2.17 ZIMTRADE acknowledge the existence of the problem and mentioned that it emanates from the strong and influential informal sectors from Zambia. These have taken advantage of the COMESA FTA and the existence of a parallel exchange rate makes them able to circumvent the channels of trade.

- 2.18 ZIMTRADE observed that since the birth of the FTA official trade has declined and been overtaken by unofficial trade, which increased. This has affected the operations of ZIMTRADE severely as they only depend on import and export surcharge for their operational resources.
- 2.19 COMESA certificate of origin has also become a problem in the sense that it should be issued by manufacturers. However, on the ground, traders do obtain these anywhere. This has created a lot of problems at the border for ZRA. The meeting was informed of the inadequate controls in the issuance of COMESA certificates and Zim Trade proposed that certificates of origin should only be issued in cases where the manufacturers were the exporters.

## **F ZIMRA**

### **Discussion**

- 2.20 ZIMRA indicated that exporters do not necessarily have to register with ZIMRA unless they require COMESA preference. All exports have to be declared with its value. Agriculture products required permits from Ministry of Agriculture. All exports with value of over Z\$5,000 have to complete CDI forms.
- 2.21 There was a problem with COMESA certificate of origin signatories lately because a new set of officers were recruited and their details have recently been sent to borders and the COMESA secretariat. ZIMRA also alluded to the difficulties in the administration of the CD1 forms which exporters were able to access without necessarily transacting through official bank channels. However, ZIMRA stated that there had been a number of seizure and court cases where it had been established that the CD1 forms were forged or fraudulently issued.
- 2.22 ZIMRA identified the parallel exchange rate as being the reason why traders manage to land goods into Zambia at lower prices than the manufacturers can land them. ZIMRA has night patrols to combat smugglers and had instances of seizures of goods with forged CDI forms. They encouraged Zambia to also engage in night patrols.
- 2.23 The ZIMRA Commissioner General specifically called for urgent signing of the Zambia – Zimbabwe Trade Agreement, the Double Taxation Agreement and a Memorandum of Understanding. It was agreed there is a great need for co-operation and the conduct of joint operations among customs officers. ZIMRA recommended that the two revenue authorities should conclude a Memorandum of Understanding as a matter of urgency.

## **G. CSO**

### **Discussion**

- 2.24 CSO collects information on price consumption and other trade statistics on a monthly basis, information on trade with SADC countries are also available on a monthly basis. However, CSO could not give any information on the levels of informal trade. The Zambian team were able to obtain all the relevant data and information available at CSO.

## **H ZIMTILE**

### **Discussion**

- 2.25 ZIMTILE produces roofing tiles materials (not asbestos). Its products are exactly the same with Zambian products. ZIMTILE does not export directly to Zambia. It last exported officially in 1994 and last filled in a CDI form in the 90s. Their main sales are domestic. The company is operating at almost 100% capacity and the business has increased lately because of a boom in the building industry. Their products are not under Government controlled prices, but their raw materials are bought at government-controlled prices. The company made available their trade statistics and prices. They also indicated their desire to explore further the Zambian market for their products.

## **I NATIONAL BLANKETS**

### **Discussion**

- 2.26 National Blankets noted that the problem was more pronounced last year and the company had sufficient export orders last year from trading partners. It could cover 80% of its foreign exchange requirements from its exports.
- 2.27 Malawi was the first one to complain about cheap blankets, the company investigated the issue and found out that informal traders were buying their blankets from local markets using the informal exchange rate. The major distributors in Zimbabwe were Jaggars, Metro and Trade All. Trade All managed to produce their own invoice indicating National Blankets and could export to any country. Issuers also fraudulently completed CD 1 forms. The company made huge losses when they were costing or selling using the official rate until it started operating on the parallel market exchange rate.
- 2.28 The company employs about 1,000 people. It is not worried about competition in the region let alone India and China. The company prices using marginal costing and operates on high volume low margins. About 23 – 30% of its production is exports and its prices are not Government controlled. The local prices and exports are not very different because it works on the parallel market rate.

### **III FINDINGS**

- 3.1 The Team observed that most of the trade problems between Zambia and Zimbabwe are a result of the dual foreign exchange regime in Zimbabwe, which needs to be resolved immediately. It was established that Zambian traders are crossing the border with cash (US Dollars) bought from the Zambian market determined foreign exchange market. These US dollars are then exchanged illegally at the Zimbabwean unofficial rate. This enables Zambian traders to purchase Zimbabwean products at very low prices, in some cases, lower than the cost of production.
- 3.2 The Team also noted that there was lack of political will to deal with the problem of the dual foreign exchange rate, which situation requires political pressure at the Regional level to be brought to bear on the Government of Zimbabwe. The technical advisors have already recommended a devaluation of the Zimbabwe dollar and a move towards a more flexible foreign exchange regime.
- 3.3 The private sector generally complained about the scarcity of foreign exchange that caused them to operate at below capacity because they could not import spare parts. Further, the companies admitted having to resort to the parallel foreign exchange market for their critical foreign currency requirements due to the fact that the banks did not have any foreign currency. It was confirmed that many firms do not directly export to regional markets due to the parallel exchange market and the blossoming informal sector. Manufacturers are unable to compete with their own products in the regional markets. In particular, Dairibord and National Blankets highlighted this issue as a major issue.
- 3.4 The private sector also confirmed that they could not control sales by the local distributors who purchase goods for the local market, in some cases at Government controlled prices, and sell the goods to middlemen who export to Zambia, Malawi, Mozambique, etc. The manufacturers as a result lose out on the foreign currency to middlemen who trade on the parallel market
- 3.5 The team learnt that to curtail this unofficial export of goods, efforts have been made to discourage export of goods meant for the local market by labelling some products 'NOT FOR EXPORT' and demanding that only exports by manufacturers should be certified as originating from Zimbabwe. There have been administrative problems in enforcement of some of the control measures.
- 3.6 The private sector felt strongly that all measures being put in place to deal with the informal sector would not yield any tangible results because authorities were dealing with symptoms rather than the problem of the controlled foreign exchange rate which needed to be liberalized to suit market conditions. The private sector also felt that ZIMRA and ZRA could jointly do more to curtail the trade problems being perpetrated by the informal sector.

## **IV SHORT TERM RECOMMENDATIONS**

- 4.1 It should be noted that the recommendations set out below are as a result of a cooperative effort and arise directly from our findings in the field. Further, in making these recommendations the team recognises the fact that this problem is not purely a trade issue but arises mainly from the distortions currently prevalent in the Zimbabwe macro economy.
- 4.2 One recommendation has already been implemented by ZRA in relation to customs valuation. This operation has been dubbed “Operation Restore Sanity” and involves the development of a price reference database used by ZRA Customs to value imports from Zimbabwe. It also involves a comprehensive anti smuggling operation that includes, physical inspections, random interceptions and visits to warehouses, and escorts of transit goods.
- 4.3 Among others, the following administrative measures may help to mitigate the effects of the parallel foreign exchange market and the informal trade.
- a. Strict enforcement of the current rules regarding CD1 forms and the COMESA Certificates of Origin. ZIMRA and ZRA should cooperate in this area by ensuring that transactions conducted have been done at the official level. Zambia should encourage the Reserve Bank of Zimbabwe to implement the securitised CD1 forms as indicated by the bank during the visit of the Mission.
  - b. The use of bank transfer payments above an agreed threshold. This would remove the loophole of cash transactions that are conducted on the black market.
  - c. Labelling of products by manufacturers stating clearly ‘FOR EXPORT’ or ‘NOT FOR EXPORT’. In our discussions with manufactures this idea was widely accepted and can be done within a short period of time. Firms like Dairibord are already doing for some of their products.
  - d. Formalisation of cooperation and consultations between the key institutions of both countries. Arising from the above it was strongly recommended that the ZRA and ZIMRA should sign a Memorandum of Understanding as soon as possible in order to provide a framework for cooperation and the conduct of joint operations.

## V MEDIUM TERM RECOMMENDATIONS

- 5.1 In the medium term the Zambian government will need to enact Safeguard legislation that can address matters of this nature adequately. However, there are already a number of recourses that the Zambian government can take under the GATT/WTO and COMESA trade agreements. The recommendations set out below are based on the advice of a leading International Trade lawyer Mr Jim Kenworthy, who spent a month in Zambia working with the Ministry of Commerce Trade and industry under ZAMTIE sponsorship.

### GATT/WTO Provisions

- 5.2 The report from Mr Kenworthy recommended that Article 20 of the GATT 94 was the most feasible instrument to use. Its provisions are outlined below.

#### General Exception-Other

**Article XX** of the GATT 94 is entitled simply "General Exceptions", meaning exceptions from the various principles and rules of the GATT. It is a kind of residual safeguard though not acknowledged as such. Presuming that a Member country can credibly demonstrate the need to deal with one of the various situations described in Article XX, it provides the least complicated or "second guessable" remedy for imports available in the entire spectrum of GATT/WTO trade remedies (except for Article XXI relating to "National Security").

Article XX authorizes a Member country to implement measures to deal with a number of situations described therein so long as the measures adopted thereunder (a) are not applied in a manner which would constitute a means of *arbitrary* or *unjustifiable* discrimination between countries where the same conditions prevail, or (b) a *disguised* restriction on international trade. Under the Article, Members may employ such measures, in relevant part, to (a) protect public morals; (b) protect human, animal or plant life or health; or **(d) Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT], including those relating to customs enforcement, the protection of patents, trade marks, and copyrights, and the prevention of deceptive practices.**

- 5.3 It should be noted that, among the concerns asserted by Zambian producers and others, are problems related to customs determination of the country of *origin* of certain products entered into Zambia from Zimbabwe, the failure of customs to assess and *collect* appropriate duties thereon, especially in terms of their proper *valuation*, indeed, the failure of customs adequately to police Zambia's border from *smuggling*, and the failure of proper assessment of conformity to required *health or safety standards* or to protect intellectual property rights relating to *trademarks*, or to prevent *deceptive practices* incident to imports, although all of these actions presumably are provided for in Zambian law.

- 5.4 So, presuming that Zambian laws relating to these situations could be held to be consistent with other applicable provisions of the GATT/WTO/Uruguay Round framework, it would appear Zambia might be able to make a cogent, credible case that measures needed to be taken to ensure compliance with relevant laws relating to or affecting imports, importing, or importers.
- 5.5 It is also interesting to note that Article XX sets forth no requirements as to the "measures" a Member country may undertake for purposes described therein, whether or not they can be "targeted" against particular countries, nor does it establish any rules for procedures, notification, or consultation. Moreover, there is no Uruguay Round or subsequent agreement, understanding, or other instrument relating to implementation of Article XX. Thus, it would appear that "measures" could include a total restriction on imports from a targeted country, or quotas or tariff rate quotas, or simply additional duties - *as long as* they were directly connected to laws or regulations not inconsistent with (e.g., consistent with) the GATT 94.
- 5.6 Although actions taken under Article XX would almost inevitably lead to complaints from Zimbabwe, as is the case already with the recent announcement of a ban, the Article itself does not contain any requirement for "compensation" to countries aggrieved by actions taken under it. Also there appears to be no post-Uruguay Round cases interpreting or applying that article either in the context of the GATT itself or of the Uruguay Round and subsequent agreements.
- 5.7 Two areas mentioned above would probably be eliminated, however, e.g., standards (which would now be covered under either the Sanitary & Phytosanitary Standards Agreement or the Agreement on Technical Barriers to Trade) and trademarks (which would now be covered under the UR Agreement on Trade-Related Intellectual Property or TRIPS). Nevertheless, since most of the complaints heard about Zimbabwean imports into Zambia relate to perceived inadequacies of administration and implementation of Zambian customs laws, it would appear that Article XX might be utilized to justify measures to restrict such imports within the constraints required in that Article.

#### Uruguay Round Agreement on Customs Valuation

- 5.8 The Customs Valuation Agreement (CVA), while not containing any provisions relating to import remedies as such, nonetheless may be relevant in addressing increased imports of study products that may have entered into Zambia either without any declarations of product value (smuggled?) or on the basis of faulty assessments of value by Zambian Customs authorities by reason of the problems alleged in the operation of the Zimbabwean dual exchange rate.
- 5.9 "Customs Valuation" is a customs procedure applied to determine the value of imported goods for purposes of then applying and liquidating the customs duties applicable to the product within its HS classification. GATT 94 Article VII laid down the general principles of the GATT for an international system of valuation, e.g., (1) that the "value" for Customs purposes of imported merchandise should be based (to

the extent possible) on the *actual value* of the goods against which a duty is assessed - or if the specific value of such goods was not determinable, then the value of like merchandise, but, in any case, value should *not* be based by reference to the value of merchandise of national origin or upon fictitious values; and (2) although Article VII contained a definition of "actual value", it permitted use of widely differing methods of valuation.

5.10 The Uruguay Round Agreement on Customs Valuation requires the *transaction or invoice* value of imported goods to be applied when (a) there are no special restrictions as to disposal or use of the goods, (b) the buyer and seller are not related, or (c) no proceeds of the subsequent sales will accrue to the exporter. But *if Customs authorities have reason to believe that the transaction value* (as manifested in letter of credit or other transaction documents) *is inaccurate*, then the value may be determined by proceeding *sequentially* through five valuing options, e.g.,

- The value of *identical* goods
- The value of *similar* goods
- The *deductive* method (sale price of identical or similar imported goods to *Unrelated* persons)
- The *computed* value method (production cost plus "normal" profit & expenses)
- An "if all else fails," method decided by the Customs authorities.

5.11 The Agreement foresees situations could arise in which Customs authorities could have *reasonable doubts* that the asserted transaction value found in customs documents (commercial invoice, letter of credit, contract of sale, purchase order, etc.) presented to them actually represents a fair value for the goods. But, if they have such doubts, they must afford the importer the opportunity to *demonstrate* that the price is, indeed, *fair*, for example, by comparing it to a previously accepted price for identical or similar goods. If, and only if, the Customs authorities determine that the transaction price as represented in the documents submitted is *not* an accurate basis for valuation, they may then employ the *second* test (determination of value on the basis of the transaction value of identical goods), or if identical goods are not available for comparison, moving on to the *third* test (transaction value of similar goods), and so on.

5.12 Only if *none* of the foregoing tests can reasonably be applied may the Customs authorities use any *other* means of establishing the value of the goods, and even then, the Agreement requires them to use means "consistent with" the Agreement. In this regard, the CVA prohibits certain methods whose use in the past led to exaggerated valuations, including valuation on the basis of the selling price of *competing domestic* goods or use of an *arbitrary* minimum value.

5.13 Note, however, that the CVA does *not* restrict the right of Customs officials to *confirm* that statements or documents presented relating to value are *true* and *accurate*.

Under a Ministerial Decision adopted after conclusion of the Agreement itself, if customs authorities have reason to *doubt* the accuracy or truth of documentation produced in support of a declared transaction value, they may ask the importer to provide *further* explanation or *evidence* demonstrating that the declared value corresponds to the *actual* value.

- 5.14 If convincing evidence is not provided, authorities may conclude the goods cannot be valued by the *first* test. Transparency rules include requirements for the written notification to an importer of the reasons for a given valuation decision, confidentiality for proprietary information submitted to Customs, and publication of regulations. Procedurally, the CVA provides a right for an importer to withdraw goods from Customs under bond if valuation is delayed and a right to judicial review against administrative valuation decisions.
- 5.15 There are special provisions responding to the concerns of developing countries like Zambia. They have a right to delay the obligation to employ the fifth valuation test (computed value) until eight years after their accession to the WTO (in Zambia's case, 01 January 2003) *if* they specifically *reserved* that right upon their accession. Similarly, developing countries that currently value goods on the basis of officially-established *minimum values*, may, subject to certain conditions, retain these values "on a limited and transitional basis", e.g., through their allotted transitional period. It should be noted here that Zambia Revenue Authority is already using this provision under its Anti-Smuggling Operation Restore Sanity.

### **Provisions under the COMESA Treaty**

#### Safeguards

- 5.16 Like GATT 94, Article XIX of the COMESA Treaty also provides for the trade remedy of "Safeguards". But its provisions are much more generalized and not nearly as demanding as the requirements of GATT Article XIX or the Uruguay Round Agreement on Safeguards.
- 5.17 Article 61:1 of the Treaty states only that "**In the event of *serious disturbances in the economy of a Member State following the application of the provisions of this Chapter, the Member State concerned shall, after informing the Secretary-General and the other Member States, take necessary safeguard measures.***"
- 5.18 The article does not require a showing of either *increased imports* or *serious injury* (or indeed, any injury). The only major condition for the invocation of Safeguards under Article 61 is that "Safeguard measures taken under the provisions of paragraph 1 of this Article, shall remain in force for a period of *one* year and may be *extended* by the decision of the Council provided that the Member State concerned shall furnish to the Council proof that it has taken the necessary and reasonable steps to overcome or correct imbalances for which safeguard measures are being

applied and that the measures applied are on the basis of non-discrimination" - presumably meaning that they may not be targeted on any specific Member State.

- 5.19 Beyond this very generalized statement of cause and remedial response, the COMESA Treaty says very little other than in Paragraph 3, which provides that "The Council shall examine the method and effect of the application of existing safeguard measures and take a decision thereon." As pointed out in the introduction to this report, the rhetoric of the Zambian private sector representatives has been to discount the possibility of anti-dumping actions as insufficient to deal with imports from Zimbabwe and have nearly uniformly stressed the need for the Government of Zambia to employ a version of "Safeguards" as the remedy of choice.
- 5.20 As between the Safeguards remedy incorporated into the GATT 94 Article XIX and its accompanying Agreement on Safeguards and the Safeguards remedy authorized in Article 61 of the COMESA Treaty, it seems clear that the latter accommodates a much more general and less demanding or constraining form of the Safeguards remedy.
- 5.21 In this regard, since both of the countries are Member States of the COMESA, it would seem that this would be the more appropriate forum for a trade remedy. Moreover, since the existence of the COMESA - as a regional trade arrangement - is exempted from the requirements of the GATT 94 under some combination of GATT 94 Article XXIV and the GATT "Enabling Clause", action under COMESA Article 61 is not subordinated as a remedy to the GATT provisions and, as such, would be the *preferred* response.

#### Balance-of-Payments Safeguards

- 5.21 The COMESA Treaty also reflects the GATT 94's provisions for imposition of import restrictions to deal with balance-of-payments concerns of Member countries under GATT Article XVIII: B. COMESA Treaty Article 49:5 provides an exception to the mandate of Article 49:1 that each Member State undertakes to remove immediate all existing non-tariff barriers to imports from other Member States by providing that:

**Notwithstanding the provisions of paragraph 1 of this Article, if a Member State encounters balance-of-payments difficulties arising from the application of the provisions of this Chapter, that Member State may, provided that it has taken all reasonable steps to overcome the difficulties, impose for the purpose only of over-coming such difficulties for a specified period to be determined by the Council, quantitative or the like restrictions or prohibitions, on goods originating from other Member States.**

In this regard, however, the COMESA provisions are clearly much more generalized and flexible in terms of the conditions for invoking such a remedy and do not involve the IMF.

## **VI. CONCLUSIONS**

- 6.1 This report has described the spectrum of trade issues, trade remedies and other possible recourses to deal with the influx of Zimbabwean imports. On the basis of the positives, negatives, and other considerations, we conclude as follows below.
- 6.2 It is apparent that nearly all of Zambian/Zimbabwean trade is conducted within the context of their affiliation with COMESA and that therefore COMESA-based remedies/recourses are more relevant and should be assessed first rather than those described herein provided for either by the GATT/WTO framework or that of the SADC Trade Protocol. Because of the number of highly arguable facts alleged by the Zambian side, concerns about causality, the asserted need for prompt action, it would appear that the COMESA Safeguards remedy (Article 61) would be most viable, with its Balance-of-Payments safeguards (Article 49) the next most viable.
- 6.3 However, if for certain policy reasons, the Government of Zambia decided to deal with Zimbabwean imports in the context of the GATT/WTO rather than COMESA, then it would appear the most viable trade remedy in terms of least-restrictive constraints and time considerations would be Article XX of the GATT/WTO under the General Exception rule.
- 6.4 It is important that all of the above conclusions should be considered in the light of the recent communiqué issued by the Presidents of Zambia and Zimbabwe at the end of President Mwanawasa's state visit to Zimbabwe in which it is said they called for "the removal of all obstacles to trade. . ." and also called for "the speedy finalisation of the bilateral agreement to increase the volume of trade between the two countries" as well as "directed their relevant ministers to work toward the agreement's speedy finalisation."<sup>1</sup>
- 6.5 Certainly, any *real* commitment to this end between the two nations would require considerable bilateral negotiation or at least discussion between them to diffuse current bilateral trade issues of the kind discussed in this memorandum *before* proceeding to invoke any one or more of the remedies described herein.
- 6.6 It is therefore, the conclusion of this report that the Zambian Government reconsiders the recent announcement of a ban and enters into further bilateral negotiations with the Zimbabwean government. If these negotiations fail, it is strongly recommended that the Zambian Government invoke Article 61 of the COMESA Treaty in addition to the Uruguay Round customs valuation agreement, the ZRA has already imposed. The Zambian government should further consider imposing quotas based on volume for a set number of Zimbabwean products. These quotas would only be lifted when the Zimbabwean government takes steps to rectify the current distortion in their economic environment.

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<sup>1</sup> ZAMNET quoting the Daily Mail, Monday, April 29, 2002.